No. 41439-2-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DEONDRE POSEY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. FACTUAL ERRORS APPEAR IN THE PROSECUTION'S PURPORTEDLY NEUTRAL STATEMENT OF THE CASE

RAP 10.3(a)(5) requires the statement of the case contain a fair statement of the facts without argument. There are several discrepancies in the prosecution's statement of the case that are significant enough to the issues presented that they warrant attention.

The prosecution claims Deondre Posey encouraged Anthony Smith to fight the complainant Martin Jones even though Smith's anger was cooling. Response Brief, at 4 (citing 5 RP 603). However, Smith's testimony was that once he decided to confront Jones and fight him if Jones was still "talking stuff," and it was Spud – not Posey – who was "amping it up." 5(p.m.)RP 602. Spud, whose real name is Christopher Lovelace, is the person Smith claimed made him feel like he needed to battle Jones. Id. Smith said that, after he told his friends he would fight Jones if needed,

> And then Spud just clowning around like I'm about to get my ass whooped and all that type of stuff so that kind of made me want to go down even more. He was like amping it up, like instigating.

5(p.m.)RP 602. The "he" Smith referred to as instigating was Spud, not Posey. As the group walked toward Jones, Smith said, "what if [Jones] says he didn't say that." 5(p.m.)RP 603. Posey merely said, "he's not going to say that." Id. Contrary to the prosecution's portrayal of the evidence, Smith never claimed his anger cooled and Posey instigated the violence by amping him up. Posey did not tell Smith to fight Jones.

The prosecution also takes pains to note that the jury reached no finding on the aggravating factor of whether Posey committed the crime to enhance his status in a gang. However, the "intentionally left blank" verdict was entered at the State's express request and should be interpreted based upon the verdict forms and instructions the State sought.

After a discussion of the proper instructions to the jury on the sentencing factor in light of State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), the prosecution asked that the jury be told the leave the verdict form blank unless it unanimously agreed to answer "yes." RP 771. Posey objected, asking for a final verdict on the aggravating factor if the jury unanimously agreed that "no" was the correct answer. RP 774. The trial court agreed that Bashaw's holding was that a blank verdict form would be treated as

a final "no" answer, because it barred retrial on the aggravating factor. RP 776. The court instructed the jury to leave the verdict form intentionally blank unless it unanimously agreed the answer was "yes." CP 182 (Instruction 27). Thus, the State insisted that the jury not leave a record if it unanimously agreed the prosecution did not prove the aggravating factor, and having set up this scenario, the verdict should not be assumed to be anything but a clear jury determination that the State did not prove the aggravating factor. The State's brief insinuates that the verdict should be perceived as incomplete, when in fact, it was a final determination that the State did nto meet its burden of proof.

2. THE PROSECUTION OFFERS NO PLAUSIBLE EXPLANATION FOR THE NECESSITY OF GANG EVIDENCE TO PROVE THE CHARGED OFFENSE

a. The State ignores the false painting of the incident before trial that prompted the trial court's ER 404(b) ruling. As explained in Posey's Opening Brief, the trial prosecutor insisted that gang evidence was critical to its case based on the meaning of

the word "cornball" known only to gang members.[1] But Posey has also interviewed the witnesses and he explained that this peculiar meaning of "cornball" amongst gang members would not be borne out by the evidence. 2RP 35-39. He asked for an evidentiary hearing for the court to accurately understand what the testimony would be when it made its determination on the probative value and prejudicial effect of the evidence the State wanted to elicit. 2RP 39. The court declined to hold any pretrial hearing on the matter and admitted extensive testimony about gang membership and gang violence. But at trial, Posey's warning proved correct, and the State's witnesses to the incident uniformly explained that "cornball" had no special meaning to gang members. See e.g., Opening Brief, at 19-22.

The State's generic arguments on appeal overlook the factual context of this case and the disingenuous or erroneous portrayal of the anticipated testimony to secure the admission of highly prejudicial gang-related evidence. While gang evidence could be admissible to some cases, it is not always admissible. To

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[1] The prosecutor convinced the trial judge to admit gang testimony based on his insistence that "this term 'Cornball" was "the motive for the shooting," and "cornball" is "a very disrespectful term for Crips." 2RP 44. Yet the Crips-member witnesses did not attach special meaning to the word "cornball." 4RP 471, 476,

the contrary, it is necessarily prejudicial and admissible only in narrow circumstances. See State v. Scott, 151 Wn.App. 520, 526, 213 P.3d 71 (2009), rev. denied, 168 Wn.2d 1004 (2010); State v. Asaeli, 150 Wn.App. 543, 576-77, 208 P.3d 1136, rev. denied, 167 Wn.2d 1001 (2009); see also United States v. Irvin, 87 F.3d 860, 865 (7th Cir. 1996).

The State relies on cases that are very different in terms of the blatant connection of gang-motivation to the charged crime. In State v. Yarbrough, 151 Wn.App. 66, 75, 210 P.3d 1029 (2009), the members of the defendant's group proclaimed their gang-affiliation by words and clothes in an argument that preceded the shooting. Just before shooting a member of a rival gang, the defendant and his group, again wearing gang-colors, flashed gang signs and shouted pro-Crips and anti-Bloods remarks. Id. The gang-related motive evidence was part and parcel of the case in Yarbrough, but the same is not true for Posey's case. Id. at 84. Posey's gang affiliation necessary to explain the shooting at issue: no one flashed gang signs or proclaimed gang allegiance as a motive. Unlike Yarbrough, gang motivation was not a legitimate

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488, 5(a.m.)RP 569, 5(p.m.)RP 635.

theory of the case. Id. at 85-86. And even Yarbrough acknowledged the "prejudicial nature of gang-related evidence" and the requirement that it must serve a legitimate theory of the prosecution as well as satisfy the requirements of ER 404(b) to be fairly admitted. Id. at 85.

A highly fact-specific analysis drove the court in State v. Boot, 89 Wn.App. 780, 789, 950 P.2d 964, rev. denied, 135 Wn.2d 1015 (1998), but the court's opinion does not explain the nature of the gang evidence introduced, so it is difficult to understand the court's reasoning regarding the extent of the gang connection to the facts of the case. In Boot, before the incident, the defendant's friends called him a baby and laughed when he threatened to shoot someone. In another incident before the shooting, the defendant confronted and shot at two people who he thought had flashed gang signs at him. Id. at 784. Also shortly before the shooting, the defendant told his cohorts that he had shot a pizza delivery man when that does not seem to have been true. Id. After the shooting, Boot boasted to another acquaintance that he had shot a girl. Id.

The constellation of evidence rendered Boot's gang-membership admissible in that case. There was factual support

documenting his desire to improve his status within the gang, although the Boot decision does not explain those facts, and there was evidence that he tried to use the shooting as well as his claims he committed another shooting to enhance his status. Id. at 789-90. In Posey's case, the testimony about gang-status was about what gang members do but was not about what motivated Posey. He had not boasted about crimes he did not commit to enhance his status, and he had not bragged about the charged shooting as a way to boost his status. The reasoning underlying Boot is too far afield to justify the admission of such evidence in the case at bar, and because Boot does not explain the nature of the gang-related evidence, it offers no helpful construct for deciding this case.

The State tries to manufacture parallels to Yarbrough and Boot by simply declaring that gang-membership is necessary to its case, when that claim is based on an unreasonable portrayal of Posey's case and an extremely cursory review of either case on which the State relies.

b. The prosecution ignores its concession that it would not have introduced any testimony on the aggravating factor in its case-in-chief unless the court admitted the testimony as substance evidence for the underlying crime. One critical omission in the prosecution's brief is its refusal to acknowledge the trial prosecutor's concession that he would not introduce gang-evidence pertaining to the aggravating factor in his case-in-chief unless the trial court admitted the evidence substantively under ER 404(b).

The trial prosecutor agreed that if the court found the gang evidence was relevant only for the aggravating factor of committing a crime for the purpose of enhancing gang membership status, he would not try to introduce it at trial. 2RP 100-01. Instead, he would wait until the jury reached a verdict on the charged offense and then ask the jury to consider the separate question of gang status in a bifurcated proceeding. Id. The State was not trying to inject gang evidence into the case unless the court admitted the evidence under ER 404(b) for purpose of showing Posey's motive. Id.

Consequently, the prosecution's brief inappropriately relies on the gang-related aggravating factor as a basis to admit the gang-status testimony at trial. This evidence would not have been before the jury if the court had properly understood the anticipated

evidence and reasonably weighed its prejudicial effect in light of the tangential connection of gang-membership that the testimony supported. The State cannot save the erroneous admission of the evidence now by resting on the aggravating sentencing factor as the basis for eliciting extensive testimony about the violent nature of gang members.

c. Res gestae is not applicable when the gang connection is tenuous to the point of irrelevance to explain the circumstances of the incident. In Boot, the court admitted evidence of the two defendants' string of bad acts in the three days prior to the shooting as res gestae evidence: the other acts were close in time and place and "necessary to show how they acted together." 89 Wn.App. at 790. A comparison with Boot is inapt here, because Posey was not involved in any string of misconduct before the incident; Posey was not accused of acting in concert with another person; and unlike the defendants in Boot, Posey was not accused of using a gun on another occasion that would connect him to the charged incident. Evidence of senseless violence perpetrated by gangs was not necessary to explain the circumstances of shooting or Posey's involvement in it.

In sum, Posey's opening brief details the inadmissibility and grossly prejudicial effect of evidence about senseless gang violence that was introduced by the State after it misrepresented its relevance to the case. The evidence should not have been admitted and its prejudicial effect resulted in an unfair trial.

3. THE SENTENCING COURT LACKS AUTHORITY TO IMPOSE A SENTENCE THAT IS NOT LEGALLY ACCURATE OR FACTUALLY CORRECT

The State misrepresents the legal standard as well as the factual background dictating the resolution of the sentencing issue. Posey did not stipulate that his prior convictions for drive-by shooting were not the same criminal conduct. There was no evidence that same criminal conduct was ever discussed in the context of Posey's 2007 sentencing.

Bare assertions by a prosecutor do not establish a sentencing dictate. See State v. Hunley, 161 Wn.App. 919, 928, 253 P.3d 448, rev. granted, 253 P.3d 448 (2011) ("The State does not meet its burden through bare assertions, unsupported by evidence," quoting State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999)). By the same token, "[t]he defendant's silence is not

constitutionally sufficient to meet this burden" that the State bears at sentencing. Hunley, 161 Wn.App. at 928.

Here the trial judge misunderstood her sentencing discretion, erroneously believing she was barred from considering the same criminal conduct status of prior convictions when that perception is contrary to statute and not supported by the record. See RCW 9.94A.525(5)(a); 10/22/10RP 13-15. The court thought any mistake that occurred at a prior sentencing hearing in reaching an offender score was binding upon it, even without evidence of whether the issue was previously litigated. 10/22/10RP 14-15.

The State's reliance on State v. Nitsch, 100 Wn.App. 512, 997 P.2d 1000 (2000), is unavailing. Unlike Nitsch, Posey objected during his current sentencing hearing. He explained that the prior convictions met the criteria for same criminal conduct, legally and factually. 10/22/10RP 4, 6, 13. The prosecution voiced no disagreement with the facial applicability of same criminal conduct, but rather insisted that it did not think the legal definition of same criminal conduct should control because Posey had previously pled guilty and received a sentence that did not treat the offenses as same criminal conduct. Under the governing statutes and case law, as explained in Posey's Opening Brief at 31-33, 37-39, courts

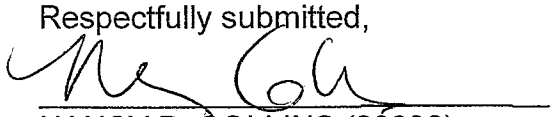
are required to assess the applicability of same criminal conduct involving prior convictions at a later sentencing hearing. Even a sentence imposed under a plea bargain must be statutorily authorized. In re Moore, 116 Wn.2d 30, 38, 803 P.2d 300 (1991) ("a defendant cannot agree to be punished more than the Legislature has allowed for"). The court was required to assess same criminal conduct here, and its failure to do so was legally erroneous.

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Deondre Posey respectfully requests this Court remand his case for further proceedings.

DATED this 3rd day of November 2011.

Respectfully submitted,



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	)	
APPELLANT.	)	

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